

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

RODNEY SPENCER,  
Appellant,  
  
v.

DEPARTMENT OF THE NAVY,  
Agency.

DOCKET NUMBERS  
DC-0752-96-0116-C-1  
DC-0752-96-0116-P-1

DATE: MAY 05 1999

Neil C. Bonney, Esquire, Neil C. Bonney & Associates, P.C., Virginia  
Beach, Virginia, for the appellant.

Joseph A. Gibbs, and Louise B. Jennings, Norfolk, Virginia, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Susanne T. Marshall, Member

**OPINION AND ORDER**

¶1 On his own motion, the administrative judge certified two issues for immediate review by the Board under 5 C.F.R. § 1201.93. For the reasons discussed below, we RETURN the appellant's request for compensatory damages and the petition for enforcement to the regional office for further proceedings.

**BACKGROUND**

¶2 On July 19, 1995, the agency proposed the appellant's removal from his GS-5 Supply Clerk position for his alleged inability to perform the duties of that

position as a result of his condition of obstructive sleep apnea.<sup>1</sup> Initial Appeal File (IAF), Tab 3, Subtab 4g. In August 1995, the appellant applied for disability retirement benefits pursuant to that condition. IAF, Tab 6. The Office of Personnel Management (OPM) denied that application in a September 27, 1995 initial decision, finding that the appellant had not established that his sleep apnea condition prevented him from performing useful and efficient service, and the appellant sought reconsideration of that decision. *Id.* Four days later, the agency issued a final decision removing the appellant, effective October 1, 1995, for his alleged inability to perform the duties of his position. IAF, Tab 3, Subtabs 4a, 4b. On October 18, 1995, the appellant appealed that action, claiming that he was not disabled from performing his duties and that the agency failed to find him employment with the agency and raising the affirmative defense of disability discrimination based on his obstructive sleep apnea. IAF, Tab 1.

¶3 Based on the written record, the administrative judge (AJ) issued an initial decision affirming the agency's actions and finding the appellant's disability discrimination claim unproven. IAF, Tab 9 (Initial Decision, Feb. 16, 1996). The appellant petitioned for review of that decision on March 25, 1996. Petition for Review (PFR) File, Tab 1.

¶4 Meanwhile, OPM issued a reconsideration decision on February 23, 1996, denying the appellant's application for disability retirement based on the same evidence it based its September 27, 1995 initial decision because the appellant had not submitted any additional medical evidence. *See Appeal File, Spencer v. Office of Personnel Management*, MSPB Docket No. DC-831E-96-0644-I-1, Tab 2, Ex. B. The appellant filed an appeal of that decision on April 9, 1996. *Id.*, Tabs 1, 2. While the appeal was pending, OPM notified the AJ that it had

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<sup>1</sup> Transient attacks of failure of automatic control of respiration, resulting in alveolar hypoventilation, which becomes more pronounced during sleep. *The Sloane-Dorland Annotated Medical-Legal Dictionary* 28 (West Pub. Co. Supp. 1992).

rescinded its February 23, 1996 reconsideration decision and approved the appellant's original application for disability retirement after a "more thorough review of the evidence submitted by the appellant" and filed a motion to dismiss the appeal based on that rescission. *Id.*, Tab 4. The AJ thus issued an initial decision dismissing the appeal for lack of jurisdiction based on OPM's rescission of its reconsideration decision. *Id.*, Tab 5 (Initial Decision, June 17, 1996). The appellant did not file a petition for review of that decision. On June 27, 1996, OPM issued a new decision, granting the appellant's original application for disability retirement benefits effective September 30, 1995. Compensatory Damages File (CDF), Tab 7, Enclosure 2. OPM did not provide an explanation for this decision. *Id.*

¶5 During the period that the appellant's petition for review of the February 16, 1996 initial decision in his removal appeal was pending before the Board, neither party informed the Board of OPM's June 27, 1996 decision granting the appellant disability retirement benefits. On January 3, 1997, the Board issued an Opinion and Order, reversing the AJ's findings that the agency had proven its charge, and that the appellant had not proven his disability discrimination claim. *Spencer v. Department of the Navy*, 73 M.S.P.R. 15 (1997) (hereinafter "*Spencer*"). Specifically, the Board found that the agency had failed to prove that the appellant's sleep apnea condition rendered him unable to physically perform the duties of his position. *Id.* at 21-24. It further found that the agency erroneously perceived the appellant as disabled by his sleep apnea condition, the appellant is a qualified disabled employee, the agency removed him for the perceived disability, and that the agency did not show a legitimate nondiscriminatory reason for its action. *Id.* at 24-26. The Board thus ordered the agency to cancel the appellant's removal and restore him effective October 1, 1995, and to provide him with back pay and other benefits. *Id.* at 26-27. Since the appellant prevailed on his disability discrimination claim, the

Board notified him that if he wished to seek compensatory damages, he could file a request with the AJ within 30 days of the date of the decision. *Id.* at 27.

¶6 The appellant timely filed a request for compensatory damages and a petition for enforcement of the Board's decision, seeking back pay and other benefits pursuant to the Board's order in *Spencer*. Compliance File (CF), Tab 1; CDF, Tab 1. During the adjudication of these matters, the agency submitted a copy of OPM's June 27, 1996 decision awarding the appellant disability retirement benefits. CDF, Tab 7, Enclosure 2. The agency subsequently submitted a February 28, 1997 decision in which OPM, noting that the appellant had been reinstated by the agency with back pay, retroactively canceled his disability retirement annuity effective September 30, 1995. CF, Tab 3. The appellant responded by alleging that his retirement on disability was involuntary. CF, Tab 5.

¶7 The AJ ordered the parties to submit arguments addressing the applicability and effect of 42 U.S.C. § 1981a(a)(3) to the appellant's request for compensatory damages and the effect of OPM's June 27, 1996 award on the same, as well as on his petition for enforcement. CDF, Tab 11. The appellant responded that section 1981a(a)(3) is inapplicable; that, under 5 U.S.C. § 7701(j), the OPM award has no impact on the appellant's request for compensatory damages and the petition for enforcement; and that, as a result of OPM's cancellation of the June 27, 1996 award on February 28, 1997, OPM's award is no longer at issue. CDF, Tabs 12, 14. The agency argued that it was unaware of the status of the appellant's application for disability retirement, including OPM's June 27, 1996 award, until it requested the appellant's Official Personnel File after *Spencer* was issued, and that this award thus constitutes new and material evidence requiring the reopening and reversal of that case. CF, Tab 13. It further argued that section 1981a(a)(3) forecloses the appellant's claim to compensatory damages. *Id.*

¶8 The AJ, on his own motion, certified the following issues to the Board for an immediate ruling:

1. What is the effect of OPM's June 27, 1996 approval of the appellant's August 1995 application for disability retirement benefits on his request for compensatory damages and entitlement to back pay, and other benefits ordered by the Board in *Spencer*.
2. Whether 42 U.S.C. § 1981a(a)(3) applies to the appellant's request for compensatory damages so as to foreclose his claim to compensatory damages.

¶9 The AJ also requested that the Board, if necessary, reopen *Spencer* and revisit its findings in that case in light of OPM's June 27, 1996 approval of the appellant's August 1995 application for disability retirement benefits.<sup>2</sup> CF, Tab 7; CDF, Tab 15. The appellant submitted a brief addressing the two issues certified to the Board. CF, Tab 8.

¶10 In a July 8, 1997 submission, the agency notified the Board that the appellant had resigned from federal service, effective June 20, 1997, to participate in the agency's Voluntary Separation Incentive Program. CF, Tab 9; *see also* CDF, Tab 16.

### ANALYSIS

*The Board declines to reopen the appellant's adverse action appeal to consider the effect of the appellant's August 1995 application for disability retirement benefits and OPM's June 27, 1996 award of such benefits on the Board's Opinion and Order in that case.*

¶11 As set forth above, the AJ asked the Board for guidance concerning OPM's June 27, 1996 award of disability retirement benefits which only recently came to his attention when the agency submitted it during the adjudication of the appellant's petition for enforcement and request for compensatory damages. CF,

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<sup>2</sup> Although the AJ did not explicitly state that he was staying the proceedings in the appellant's request for compensatory damages and the petition for enforcement, the record shows that he in effect has done so.

Tab 7; CDF, Tab 15. Specifically, he asked the Board to address the effect of that award on the appellant's request for compensatory damages and entitlement to back pay, and other benefits ordered by the Board in *Spencer*. *Id.* He further requested that the Board, if necessary, reopen the appellant's adverse action appeal and revisit its findings in that case. *Id.*

¶12 After the AJ certified this interlocutory appeal, the Board issued *Lamberson v. Department of Veterans Affairs*, MSPB Docket No. DE-0752-97-0456-I-1, slip op. ¶ 30 (Jan. 20, 1999), (hereinafter *Lamberson*), in which it declined to erect an absolute procedural bar via judicial estoppel to prevent a recipient of disability retirement benefits from claiming disability discrimination. The Board held for the first time that, instead, it will employ a case-by-case approach in determining the effect of an appellant's application for or receipt of a disability retirement award upon a claim of disability discrimination. *Id.*, slip op. ¶¶ 30-32. For the reasons set forth below, we decline to reopen the appellant's adverse action appeal to consider the effect of the appellant's August 1995 application for disability retirement benefits and OPM's June 27, 1996 award of such benefits on *Spencer*.

¶13 The Board may reopen or reconsider a case on its own motion to correct its own errors or to modify its judgment, decree, or order. *Payne v. U.S. Postal Service*, 69 M.S.P.R. 503, 506 (1996). A determination to reopen a case is discretionary, and involves balancing the desirability of finality and the public interest in reaching what ultimately appears to be the right result. *Woodall v. Federal Energy Regulatory Commission*, 28 M.S.P.R. 192, 195 (1985). A case may be reopened in the interests of justice, particularly where the evidence is of such weight as to warrant a different outcome. *See Payne*, 69 M.S.P.R. at 506. Reopening may also be appropriate where there is "a conflict between the holding of the decision and a controlling precedent or statute, either because of oversight or a change in the controlling law between the date of the original decision and the reopening request." *Woodall*, 28 M.S.P.R. at 195. However, the Board's

authority to reopen an appeal is limited by the requirement that such authority must be exercised within a reasonable amount of time, which is generally measured in weeks rather than years. *See Payne*, 69 M.S.P.R. at 506; *Welber v. U.S. Postal Service*, 62 M.S.P.R. 98, 102 (1994); *Woodall*, 28 M.S.P.R. at 194-95. The Board will reopen a case only if the party requesting reopening exercised due diligence in seeking reopening. *See Langford v. Department of the Treasury*, 73 M.S.P.R. 129, 135-36 (1997); *Welber*, 62 M.S.P.R. at 103.

¶14 Here, the agency exercised due diligence in requesting that the Board reopen *Spencer* just 2 1/2 months after the Board's Opinion and Order in that case was issued. CF, Tab 13. The agency argued that the Board, had it been made aware of OPM's June 27, 1996 award of benefits while the adverse action appeal was pending, would have found that the appellant was actually disabled and would have thus affirmed the agency's removal action and found the appellant's disability discrimination claim unproven. *Id.* It is undisputed, however, that OPM retroactively canceled its award of benefits in its subsequently issued February 28, 1997 decision and demanded that the appellant repay the benefits he received in error for the period of September 30, 1995, through January 31, 1997. CF, Tab 3. Thus, there no longer exists an OPM award of disability retirement benefits that the agency could allege is inconsistent with the appellant's claim that the agency erroneously perceived him as disabled and that he was physically able to perform the duties of his position at the time of his removal. Hence, the agency has not shown that OPM's June 27, 1996 award of benefits is of sufficient weight to warrant a different outcome from that in *Spencer* and we decline to reopen that case. *See Langford*, 73 M.S.P.R. at 137.

¶15 Further, the agency and the Board were well aware of the appellant's August 1995 application for disability benefits while the appellant's appeal of his removal was pending. *See, e.g., Spencer*, 73 M.S.P.R. at 22 n.4. Thus, the appellant's August 1995 application for disability benefits is not new evidence. *See generally*

*Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980) (evidence that is already a part of the record is not new). The agency could have, but did not, raise the claim that the application for disability benefits was inconsistent with his removal appeal while that appeal was pending. Under these circumstances and in the interest in finality, we decline to reopen the appellant's adverse action appeal to address that issue now. *See Payne*, 69 M.S.P.R. at 506; *Woodall*, 28 M.S.P.R. at 195.

*The appellant's entitlement to back pay and other benefits pursuant to the Board's order in Spencer is not limited, under Cooper v. Department of the Navy*, 108 F.3d 324 (Fed. Cir. 1997), by OPM's June 27, 1996 award of disability retirement benefits.

¶16 In his certification of the interlocutory appeal, the AJ further stated that:

With respect to appellant's petition for enforcement regarding the Board's decision that he is entitled to back pay and other benefits, I would respectfully refer the Board to the case of *Cooper v. Department of the Navy*, 108 F.3d 324 (Fed. Cir. 1997). In this regard, once the agency cancelled [sic] the removal action, as per the Board's direction, the agency could have, and perhaps should have, merely reflected appellant's retroactive separation through disability retirement. The agency instead reinstated appellant and moved to comply with the Board's further directions to provide appellant with back pay and other benefits. In response thereto, OPM has cancelled [sic] appellant's disability retirement, and seeks to recover the annuity benefits previously paid to the appellant. It would appear that under *Cooper*, however, appellant was entitled to no further relief beyond cancellation of the appealed action and the removal of all references thereto from his Official Personnel Folder.

CF, Tab 7 at 2; CDF, Tab 15 at 2.

¶17 The AJ's interpretation of *Cooper* is incorrect as applied to the facts in this case. In *Cooper*, the court upheld the Board's decision that an agency's rescission of a removal action and elimination of all references to the removal from an appellant's personnel file following OPM's grant of an application for disability retirement rendered the appellant's appeal from that removal moot. *Cooper*, 108



F.3d at 326. In contrast, here, the agency canceled the removal action pursuant to the Board's order in *Spencer*, 73 M.S.P.R. at 26, not in response to OPM's June 27, 1996 approval of the appellant's application for disability retirement benefits. *See, e.g.*, CF, Tab 4. Upon canceling the appellant's removal, the agency, as the AJ noted, did not "reflect[] [the] appellant's retroactive separation through disability retirement," but rather returned the appellant to his previous position on January 19, 1997, pursuant to the Board's order in *Spencer*. CF, Tab 7 at 2; *see* CF, Tab 4, and Tab 8 (Spencer's Affidavit). Further, upon learning that the appellant had been reinstated by the agency, OPM retroactively rescinded its June 27, 1996 award of disability retirement benefits on February 28, 1997. CF, Tab 3. Thus, regardless of the AJ's speculation as to what the agency *could have* or *should have* done, *see* CDF, Tab 15 at 2; CF, Tab 7 at 2, the agency did not cancel the removal action following OPM's June 27, 1996 grant of the appellant's application for disability retirement and the agency's subsequent retroactive cancellation of the removal action and reinstatement of the appellant on January 19, 1997, pursuant to the Board's order in *Spencer*, 73 M.S.P.R. at 26, did not render the appellant's petition for enforcement of that order moot. *See Cooper*, 108 F.3d at 326. Accordingly, contrary to the AJ's statement, *Cooper* does not apply to the appellant's petition for enforcement so as to limit the relief that he is entitled to pursuant to the Board's order in *Spencer*, 73 M.S.P.R. at 26. *See Lamberson*, slip op. at 6-7 (finding that *Cooper*, which did not discuss the effect of a discrimination claim and a request for compensatory damages on what would otherwise be a moot Board appeal, is not controlling under the circumstances).

¶18 The AJ shall therefore consider and address whether the agency, as the appellant alleged in his petition for enforcement, has failed to provide him with the ordered back pay and other benefits.

*Section 1981(a)(3), 42 U.S.C., does not apply to the appellant's request for compensatory damages.*

¶19 The Board found the appellant's disability discrimination claim proven based on the agency's erroneous perception that he was disabled and thus notified him that if he wished to seek compensatory damages, he could file a request with the AJ. *Spencer*, 73 M.S.P.R. at 27. The AJ subsequently ordered the parties to submit arguments addressing the applicability and effect of 42 U.S.C. § 1981a(a)(3) to the appellant's request for compensatory damages. CDF, Tab 11. After reviewing the parties' responses and the record, the AJ stated in his certification of interlocutory appeal that he was prepared to rule that the agency made good faith efforts to accommodate the appellant's medical conditions, and that the appellant is not entitled to compensatory damages. CDF, Tab 15 at 2. In other words, the AJ implicitly stated that he was prepared to rule that 42 U.S.C. § 1981a(a)(3) applied to the appellant's request for compensatory damages and precluded him from receiving such relief. *Id.* This was error.

¶20 That section provides that:

In cases where a discriminatory practice *involves the provision of a reasonable accommodation* ... damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of business.

42 U.S.C. § 1981a(a)(3) (emphasis added). This section, on its face, is expressly limited to a discriminatory practice that "involves the provision of a reasonable accommodation." *Id.*

¶21 In *Spencer*, however, we found that no accommodation was necessary because the agency had erroneously regarded the appellant as disabled when in fact he was performing the duties of his position satisfactorily up until his removal without any accommodation. *Spencer*, 73 M.S.P.R. at 26. Thus, section

1981a(a)(3), according to its plain language, does not apply to the appellant's request for compensatory damages so as to preclude him from receiving such damages because the discriminatory practice that we found in *Spencer* did not involve the provision of a reasonable accommodation. *Id.*; see *Yates v. U.S. Postal Service*, 70 M.S.P.R. 172, 179 (1996) (accommodation not an issue as no accommodation was required, citing *Adams v. Reno*, EEOC Petition No. 039401156, slip op. at 8 (Feb. 2, 1995)).

¶22 Accordingly, in light of our findings of a discriminatory practice based on the agency's erroneous perception that the appellant was disabled, *see id.*, which we affirm in this Opinion and Order as discussed above, the AJ shall adjudicate the appellant's request for compensatory damages by determining whether the appellant incurred compensatory damages in connection with his adverse action appeal and whether the amount of damages requested is appropriate. *See* 42 U.S.C. § 1981a(b).

#### ORDER

¶23 Accordingly, we return the appellant's request for compensatory damages and the petition for enforcement to the Washington Regional Office for further processing and adjudication consistent with this Opinion and Order. This is the final order of the Merit Systems Protection Board in this interlocutory appeal, *see* 5 C.F.R. § 1201.91.<sup>3</sup>

FOR THE BOARD:

Washington, D.C.

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Robert E. Taylor  
Clerk of the Board

<sup>3</sup> We note that during the compliance proceedings the appellant claimed for the first time that his application for disability retirement was involuntary. CF, Tab 5. Any involuntary retirement claim, however, was rendered moot by OPM's February 28, 1997 retroactive cancellation of its award of disability retirement. CF, Tab 3. Moreover, the appellant would not be entitled to any additional relief under a constructive removal doctrine. *See Scalese v. Department of the Air Force*, 68 M.S.P.R. 247, 249 (1995).

